SERVED: March 27, 1992

NTSB Order No. EA-3521

UNITED STATES OF AMERICA

NATIONAL TRANSPORTATION SAFETY BOARD

WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 12th day of March, 1992

RICHARD H. GULL,

Applicant,

v.

Docket 59-EAJA-SE-8823

BARRY LAMBERT HARRIS,
Acting Administrator,
Federal Aviation Administration,

Respondent.

OPINION AND ORDER

The Administrator appeals from the initial decision and order on a fee application issued by Administrative Law Judge John E. Faulk on March 14, 1989. The initial decision granted applicant's fee application, filed pursuant to the Equal Access to Justice Act (5 U.S.C. 504) (EAJA), and our rules at 49 C.F.R. Part 826. We grant the appeal in part.

The fee application stems from a prior proceeding in which the Administrator charged applicant with violating Federal Aviation Regulation (FAR) sections 43.9(a)(l), (a)(2), and (a)(4) in connection with six different aircraft, and one count of

violating FAR 43.13(b). Prior to the hearing, the Administrator withdrew all the section 43.9(a)(2) and (a)(4) claims, and withdrew the complaint with regard to four of the six aircraft. Tr. at pps. 4-5. The law judge found that, as a matter of law, the remaining section 43.9(a)(1) claim could not stand because that regulation did not apply to this Part 135 operation. Mr. Gull was found to have violated section 43.13(b). The Administrator did not appeal, and Mr. Gull's appeal was withdrawn.

The EAJA fee application was the subject of a further initial decision.[1] As required to award fees, the law judge found that the Administrator's position as to the section 43.9(a)(1) claim was not "substantially justified." 5 U.S.C. 504(a)(l). The fee awarded -- totalling $1,845 -- was intended to represent 75% of counsel's documented hours multiplied by $75 per hour (the statutory cap).[2] The law judge found that 75%, as proposed by applicant, was reasonable, given that the preponderance of the charges related to section 43.9 and all of these were either withdrawn or dismissed.

The Administrator urges a number of grounds for reversal of the initial decision. He argues that applicant may not recover because he was not the "prevailing party," as EAJA uses the term.

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[1] Copies of both initial decisions are attached.

[2] Initial Decision at p. 5. The law judge's analysis should have resulted in an award of $1384 in attorneys' fees (24.6 hours X $75 = $1845 - 25% = $1383.75). The order, therefore, was mathematically incorrect and it is hereby corrected from $1845 to $1384.

Next, he claims that his position was "substantially justified," thus precluding the award of any fees. He further argues that, in any event, applicant's submission fails to provide the detail necessary to authorize the payment of fees. The Administrator especially objects to the law judge's method of calculating the appropriate fee.[3] We address each issue in turn.

Although the Administrator argues that applicant is not a prevailing party under 5 U.S.C. 504(a)(l), he does not pursue that claim in his appeal, other than to note that applicant did not prevail as to the section 43.13 claim.[4] Although EAJA does not define "prevailing party," courts have done so. The D.C. Circuit has held the term to require that the final result represent "in a real sense a disposition that furthers [a fee claimant's] interest.'* National Coalition Against Misuse of Pesticides v. EPA, 828 F.2d 42, 44 (D.C. Cir. 1987). The law judge's decision on the merits did so, even if judged only in terms of the reduced suspension period.[5] The Administrator offers insufficient reason for us to overturn the initial decision on this basis.

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[3] The Administrator also appears to argue that the law judge allowed a fee above $75 per hour. We see no evidence of this, nor is the Administrator's claim in this regard explained. We will not address it further.

[4] This argument seems an extension of one in his answer to the EAJA application, where the Administrator claimed that he was substantially justified because he prevailed with the most Insignificant" allegation.

[5] We have awarded fees in cases where the results were not one-sided. See, ea., Administrator v. Rooney, NTSB Order EA-2432 (1986) .

As to whether the Administrator was substantially justified in his action, the law judge found that, because the remaining section 43.9 claim was dismissed as inapplicable and the Administrator did not appeal that finding, he may not now argue that his prosecution was substantially justified. This misconstrues the meaning of that term. EAJA, at 5 U.S.C. 504(a)(l), states that:

> Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

It is not whether the government wins or loses or whether the government appeals that determines whether its position is substantially justified. See generally Federal Election Com'n v. Rose, 806 F.2d 1081 (D.C. Cir. 1986); National Coalition, supra; and Administrator v. McCrary, NTSB Order EA-2365 (1986).

Instead, the relevant inquiry is whether the government's case is "'justified in substance or in the main' -- that is, justified to a degree that could satisfy a reasonable person." Pierce v. Underwood, 487 U.S. 552, 565, 108 S.Ct. 2541 (1988).[6] The Court phrased this test as requiring a "reasonable basis both in fact and law." Id. This is to be judged as a whole, and should include an assessment, as relevant, of whether there was sufficient reliable evidence initially to prosecute the matter.

[6]"[O]ne would expect that where the Government's case is so feeble as to provide grounds for an EAJA award, there will often be . . . a failure to appeal from the adverse judgment." 487 U.S. at 560.

Catskill Airways, Inc., 4 NTSB 799 (1983). EAJA awards are intended to dissuade the government from pursuing "weak or tenuous" cases; the statute is intended to caution agencies to evaluate their cases carefully, not to prevent them from bringing those that have some risk. Id., and Administrator v. Wendler, 4 NTSB 718 (1983), aff'd Wendler v. NTSB, No. 83-1905 (lOth Cir. . February 28, 1985).

Applying the proper analysis to the facts of the case, we must first decide whether the law judge was correct in concluding that the Administrator was not substantially justified in claiming applicant violated FAR section 43.9(a)(l). As discussed above, the law judge's decision proceeded from a false premise (i.e., that the failure to appeal precludes the Administrator from arguing he was substantially justified in his action). Our review of the record indicates that the law judge's conclusion is inconsistent with the evidence and that the Administrator's position was substantially justified.

In his appeal, at pages 14-16, the Administrator discusses in detail his rationale for applying section 43.9(a)(1) to applicant. Whether that interpretation is correct is not the question. Rather, the issue is whether he had a reasonable foundation for his position. We find his explanation reasonable, and note the lack of any meaningful response from applicant. There being no claim that, if the regulation applies, a factual predicate for the complaint was lacking, we find the Administrator's position with regard to the section 43.9(a)(1)

allegation reasonable in fact as well and therefore substantially justified.

The law judge did not discuss those claims the Administrator withdrew, yet the same analysis is required for them as well. That charges are withdrawn does not compel a conclusion that the government's position was not substantially justified. Instead, the government's actions throughout the process must be reviewed. Administrator v. Pando, NTSB Order EA-2868 (1989). In this regard, however, the Administrator has offered no discussion of the investigative or evidentiary basis for bringing these claims or his reasons for withdrawing them, and it is the Administrator who has the burden of proof. Indeed, at least one of the matters involved under 43.9(a)(2) and (a)(4) (e.g., whether applicant's log entry indicated the date work was completed) is so straight forward that compliance or lack of it should have been obvious even at the initiation of the case. In view of the burden of proof, we have no choice but to find that the Administrator's position as to these aspects of the complaint was not substantially justified, and affirm the result reached by the law judge as to these claims.

We are left with deciding how our modification of the law judge's decision affects his fee award. The Administrator's appellate objections both to the level of documentation in the application and to the law judge's 75% award continue to be relevant.

As far as documentation is concerned, we would not expect

that attorneys would (or would necessarily be able to) subdivide their work report by each claimed illegality. Applicant has submitted what our rules require, and we will not demand further elaboration.[7] Accord Administrator v. Sottile, 4 NTSB 1217, 1221 (1984).

How to effect our finding that the Administrator failed to prove he was substantially justified in the section 43.9(a)(2) and (a)(4) claims is a more difficult question. Obviously, the law judge's award cannot be supported under our revised analysis of the section 43.9(a)(1) claim. Moreover, some approximation continues to be necessary given the available data, and is allowable.[8] Of the total 24.6 hours charged, 6 hours were spent at the hearing. We can, therefore, initially subtract these from our calculation, as the (a)(2) and (a)(4) claims here found subject to EAJA were not litigated. We will authorize collection of 75% of the remaining 18.6 hours -- a total of $1046 (rounded). This reflects applicant's original position, affirmed by the law judge and unrebutted by the Administrator, that 75% of counsel's

[7] Rule 826.23 requires the filing of a separate itemized statement from each service provider, showing the hours spent in connection with the proceeding by each individual, a description of the specific services performed, the rate, any expenses, and the total amount paid.

[8] See Administrator v. Rooney, supra (fee reduced by one third after Administrator's appeal on one (of three) issues granted). See also Wilkett v. ICC, 844 F.2d 867 (D.C. Cir. 1988) (upon finding claim excessive, court reduced it' by half).

time was spent on section 43.9 matters.[9] Although the 75% figure is no longer entirely valid (as we have here found one of those matters ineligible for award), our eliminating the hearing time should avoid overcompensation.

Finally, we will add to the award to cover handling this matter at the appellate level. Sottile, supra. It appears, however, that the amount claimed is excessive. Applicant's counsel contends that 6 hours were so spent. Given that the reply is less than 4 pages and contains no legal analysis, we will reduce the amount by half, to $225.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted in part;
2. The initial decision is modified as set forth above; and
3. Applicant is entitled to an award of attorneys' fees in the amount of $1271.

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

[9] We reject the Administrator's suggestion that, because a number of matters were withdrawn prior to the hearing, the 75% estimate is without basis. To accept this proposition, we would have to find that counsel did no work (or needed to do no work) on these matters prior to being told they were being withdrawn. Both common sense and the bills themselves prove the contrary.